

December 20, 2018

Brig. General D. Peter Helmlinger
Commander, South Pacific Division
U.S. Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103-1398

Dear General Helmlinger:

In furtherance of the concerns we identified in our July 18, 2018 letter to you, which was acknowledged via email dated July 24 from William James to Daniel Stellar, The Nature Conservancy ("TNC") is submitting this letter to underscore the need for further review of the Rosemont Copper Project (the "Project") under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") prior to the issuance of the Clean Water Act section 404 permit (the "Permit") for the Project as presently proposed. Both the Environmental Impact Statement ("EIS") and the Biological Opinion prepared for the Project critically fail to address impacts of the Project that would result from implementation of the proposed Habitat Mitigation and Monitoring Plan ("HMMP") supporting the Permit. These impacts include significant adverse consequences, including to listed species, in TNC's Patagonia-Sonoita Creek Preserve (the "Preserve").

Specifically, implementation of the HMMP would involve changes to the Sonoita Creek upstream of the preserve that would result in accelerated transport of sediment downstream, which would negatively affect the conservation values of TNC's property, including the aquatic and riparian communities that support rare, threatened, and endangered species. This includes impacts to the Huachuca water umbel, an endangered species whose presence in the Preserve was not accounted for in the existing Project documents.

TNC did not engage in the initial permitting process for the Project. However, when TNC and our neighbors learned early this year that the mitigation for the Project would take place out of basin, in the Sonoita Creek watershed, TNC started to evaluate potential impacts to our Preserve and reached out to the Project proponents for further discussion. At this juncture, with new data regarding the occurrence of endangered species and critical habitat, TNC believes, with regard to the impacts of the HMMP, a Supplemental EIS must be prepared, and the Army Corps of Engineers ("ACOE") and/or the U.S. Forest Service ("USFS") must re-initiate consultation with the U.S. Fish and Wildlife Service ("USFWS") to consider the direct impacts of significant habitat modification proposed in the HMMP and indirect impacts of those same activities on the downstream environment.

This letter sets forth TNC's general position and the legal background supporting it. A supplemental letter detailing the technical analysis supporting TNC's concerns with the proposed HMMP will follow.

I. PRESENT STATUS OF PROJECT PERMITTING

Rosemont Copper Company (“Rosemont”) plans to develop the Project in the Coronado National Forest and requires, among other things, approval from the USFS of the mine plan of operations (“MPO”). The USFS prepared an EIS as the lead agency under NEPA, consulted with the USFWS to secure an Amended Final Reinstated Biological and Conference Opinion for the Rosemont Copper Mine (“Biological Opinion”, dated April 2016), and approved the MPO in June 2017. The USFS Record of Decision (“ROD”) documenting those approvals further recognized that additional approvals may be required for the Project, including a section 404 dredge and fill permit from the ACOE. *See* Forest Service Record of Decision, June 2017 (“ROD”) § 4.3.2.5 (“[T]he mitigation required as part of the 404 permit has not yet been fully determined by the [ACOE] and continues to evolve.”). The Biological Opinion also recognized that some aspects of the Permit and associated mitigation measures might require additional consultation.

Subsequent to the approval of the Project by the Forest Service on the basis of the EIS and the Biological Opinion, Rosemont applied to the ACOE for the subject Permit, and prepared a revised HMMP (dated September 12, 2017) as part of the application. A core component of the proposed HMMP is restoration of the Sonoita Creek as compensatory mitigation for the Project’s filling in of certain channels in the Cienega Creek watershed. The location of the restoration project at Sonoita Creek is directly upstream of TNC’s Preserve. The restoration would result in impacts, including downstream impacts on the Preserve, that were not evaluated in the EIS or Biological Opinion. In order for the Permit to issue, the ACOE must ensure its actions are consistent with NEPA and the ESA—it must ensure environmental impacts of its permitting are appropriately considered in an EIS, and it must ensure its actions are consistent with protection of endangered species through consultation with the USFWS.

II. ISSUANCE OF THE PERMIT REQUIRES ADDITIONAL ESA AND NEPA COMPLIANCE

The HMMP will result in significant impacts to the environment and special status species that have not yet been adequately addressed or considered by the relevant agencies. The proposal includes “restoration” in Sonoita Creek upstream of the Preserve that would involve filling an existing channel in two locations, and reconstructing the channel to cover a greater distance (and thus include more mitigation acres) by including more curves—i.e. a higher sinuosity. As explained in prior comments, including in the U.S. Environmental Protection Agency’s (“EPA’s”) October 5, 2017 comment letter, a major problem with this proposal is that the new channels are expected to fail and erode with storm events, and sediment is expected to be transported downstream, having an adverse impact on the Preserve and its ecosystems. These impacts will be significant, and will adversely affect listed species and habitat, all as detailed more fully in a supplemental technical letter TNC is submitting to ACOE following this submittal.

Because the HMMP introduces significant impacts to the environment, including to listed species, that were not considered in the EIS and Biological Opinion, and because the HMMP is a critical component of the Project approvals, a Supplemental EIS and re-initiation of consultation is required to comply with NEPA and the ESA before the Permit can issue.

A. Re-Initiation of Consultation is Required Under the ESA

The Biological Opinion fails to consider the full extent of the proposed project and the indirect effects of required mitigation measures in violation of Sections 7(a)(1) and 7(a)(2) of the ESA. 16 U.S.C. §§ 1536(a)(1), (a)(2). As a result, any take of threatened and endangered species that may occur in connection with the development and operation of the mine and implementation of the required mitigation will be unauthorized and in violation of ESA Section 9. *Id.* § 1538. The USFWS, USFS and ACOE must reinitiate consultation to consider activities and impacts that will be part of the Project.

1. The Biological Opinion Is Inconsistent with the Federal Agencies' Obligation to Conserve Listed Species

The fundamental purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” *Id.* § 1531(b). More pointedly, Congress adopted the ESA “to halt and reverse the trend toward species extinction -- whatever the cost.” *TVA v. Hill*, 437 U.S. 153, 184 (1978); *id.* at 174 (concluding “language, history and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities”). Given this unambiguous objective, all agencies responsible for administering and implementing the ESA must aim to further species recovery and conservation. *See also* 16 U.S.C. § 1536(a)(1) (requiring that all federal agencies “in consultation with and with the assistance of the Secretary [of the Interior], utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act [16 USC § 1533]”); *id.* § 1532(3) (defining “conserve” to broadly mean “the use of all methods and procedures which are necessary to bring any endangered . . . or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary”); *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir.1998) (“Given the plain language of the statute and its legislative history, we conclude that Congress intended to impose an affirmative duty on each federal agency to conserve each of the species listed . . .”). In failing to consider all of the direct and indirect impacts of the Project, which includes its required mitigation, the USFS, ACOE and USFWS failed to meet their obligations under Section 7(a)(1) of the ESA.

2. The Biological Opinion Is Inadequate and Rosemont Accordingly Cannot Rely on the Opinion as Drafted to Authorize Impacts to Species

In addition to express recovery requirements imposed on agencies, the ESA makes it unlawful for any person to, *inter alia*, “take” any endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1). The term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* at § 1532(19). Prohibited actions thus include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

Where, as here, a private party requires a federal permit for a project that “may affect” one or more listed species (i.e., may result in take), the permitting agency must engage in a consultation with USFWS to evaluate the impacts of the proposed project on the species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The analysis must consider the “best scientific and commercial data available” and be thoroughly documented in a biological opinion that determines whether the project,

considering all other circumstances, is or “is not likely to jeopardize the continued existence of” the species or “result in the destruction or adverse modification of critical habitat . . .” 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(d), (h)(3). If USFWS determines, in a biological opinion, that jeopardy will not occur, it may issue an incidental take statement (ITS) that authorizes take, notwithstanding the prohibitions in Section 9, in accordance with “reasonable and prudent measures” to minimize the take, as well as terms and conditions to implement those measures. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(i)(1)(i).

a. Consultation is required to cover entire agency action, taking into account direct and indirect effects.

To effectively guard against jeopardy and facilitate recovery, the biological opinion must analyze the entire agency action. *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988); *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1155 (D. Ariz. 2002). *Greenpeace v. Nat. Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1145-1146 (W.D. Wash. 2000) (“An agency may not unilaterally relieve itself of its full legal obligations under the ESA by narrowly describing the agency action at issue in a biological opinion.”). An agency may not piecemeal the action into segments to avoid considering distinct or future aspects of a project. *Conner*, 848 F.2d at 1457-1458; *Rumsfeld*, 198 F. Supp. 2d at 1156 (explaining that “the period covered by a biological opinion is defined by life of the project or agency action”); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 128-130 (D.D.C. 2001) (requiring that the ESA consultation consider the impacts of all activities within the action area that could affect listed species). “Segmented consultations of a single agency action are counter to the ESA’s requirements because an ‘agency action could ultimately be divided into multiple small actions, none of which, in and of themselves would cause jeopardy.’” *Friends of the River v. Nat’l Marine Fisheries Serv.*, 293 F. Supp. 3d 1151, 1170 (E.D. Cal. 2018) (quoting *NRDC v. Rodgers*, 381 F. Supp. 2d 1212, 1237 n.43 (E.D. Cal. 2005), quoting *Am. Rivers v. U.S. Army Corps of Eng’r*, 271 F. Supp. 2d 230, 255 (D.D.C. 2003)).

The USFWS furthermore must “take into account both the ‘direct and indirect effects of an action on the species or critical habitat’ when determining whether an action is likely to cause jeopardy.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 627 (2014) (quoting 50 C.F.R. § 402.02 and citing 16 U.S.C. § 1536(a)(2)). “‘Indirect effects’ are ‘those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.’” *Id.* (quoting 50 C.F.R. § 402.02).

b. Agencies must re-initiate consultation on the basis of new information, not previously considered.

USFWS must reinitiate consultation “where discretionary federal involvement or control over the action has been retained or is authorized by law” and “[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16. As explained in more detail below, the consultation supporting the Project was improperly narrow and information, new or not, reveals effects not previously considered. USACE must reinitiate consultation to remedy these errors.

c. Re-initiation is required because the Biological Opinion does not address direct impacts of the HMMP or indirect impacts on TNC’s Preserve.

Here, the consultation conducted by USFWS, USFS and the ACOE was inadequate, and the take authorized by the ITS is consequently invalid, because the agencies did not undertake an analysis that is co-extensive with the action. Instead, the scope of USFWS's review was artificially narrow as it was based on limited aspects of an earlier September 2014 Habitat Mitigation and Monitoring Plan ("2014 HMMP"). The analysis considered, for example, the impacts of restocking certain aquatic environments with fish species, but contained no analysis of the impact on endangered species as a result of the significant disturbance of habitat, some of it listed as critical for endangered species, which will result from rerouting Sonoita Creek.

More specifically, the Biological Opinion represents that the 2014 HMMP activities are within the scope of the action covered by the consultation, observing that the "HMMP-related actions are considered conservation measures for effects to threatened and endangered species . . . and as a part of the Federal action undertaken by the Corps . . . [and] the [2014 HMMP] parcels are part of the action area for this consultation." But the opinion also admits that "the ecosystem restoration proposed for the Sonoita Creek Ranch may involve its own impacts to Waters of the United States thus likely to require additional Corps permitting prior to implementation. Given the likely presence of threatened and endangered species on the Sonoita Creek Ranch property, it may also require section 7 consultation." The latter representation is more accurate – the Biological Opinion fails to consider the impacts of re-engineering miles of a functioning creek system for private benefits. Indeed, the Biological Opinion, which purports to analyze the impacts of the 2014 HMMP, does not even consider the 2017 HMMP that Rosemont now proposes to implement. Among other things, the failure to consider the actual Project, and all of the direct and indirect impacts of that Project, violates USFWS's and USACE's obligations under the ESA.

ACOE's present permitting process and accompanying section 7 consultation are integral components of the Project. The development of the mine cannot proceed without the mitigation that these actions would purportedly provide. Because future consultations on integral components of the mine project (i.e., required conservation measures) were excluded from the Biological Opinion, the agencies are required to reinitiate consultation to consider the impacts of the entire action and the mine project cannot proceed until such reinitiated consultation takes place, along with appropriate revisions to the Biological Opinion. *See* 16 U.S.C. § 1536(d) (prohibiting, until a proper consultation has concluded, "irreversible and irretrievable commitment of resources" that would foreclose the agency's ability to implement reasonable and prudent alternatives); *see also* 50 C.F.R. § 402.09.

The need for additional consultation is not just a procedural matter, as the USFWS's overly narrow Biological Opinion fails to address significant, indirect impacts of the HMMP on downstream resources. As an initial matter, the Biological Opinion wrongfully concludes that habitat supporting the Huachuca water umbel does not exist in the Preserve, as it identified an area much further upstream as the last remaining population of umbel in the Sonoita Creek watershed. TNC has observed a population of the Huachuca water umbel in the perennial reach TNC owns and manages on Sonoita Creek as recently as July of this year. (TNC notified USFWS of the observations via July 11, 2018 letter to Julie Crawford). The proposed restoration in Sonoita Creek under the new HMMP will result in impacts to sensitive species that were not previously considered. In particular, sedimentation, particularly fine sediment, associated with the re-engineering of Sonoita Creek has the potential to result in unprecedented volumes of deposition, potentially filling the active stream channel. These changes will reduce surface water and have a multitude of adverse effects on downstream conservation lands including, among other things, the elimination of habitat supporting a native population of Huachuca water umbel. In light of these effects that were not previously

given any consideration in the Biological Opinion, in order to issue the Permit in support of the Project, the ACOE must re-initiate consultation pursuant to the ESA.

B. Preparation of a SEIS Is Required Under NEPA

NEPA is our Nation's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Under NEPA, federal agencies must prepare an EIS prior to undertaking major federal action that significantly affects the environment. 42 U.S.C. § 4332(2)(C). The EIS must provide a "full and fair discussion" of the significant environmental impacts associated with the action that is "supported by evidence that the agency has made the necessary environmental analyses," 40 C.F.R. § 1502.1, and it must contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004). "An EIS may be found inadequate under NEPA if it does not reasonably [set] forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision." *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 509 (9th Cir. 1988).

After an EIS had been prepared for a project, if there are changes or new information or circumstances associated with the project that were not considered in the EIS, the lead agency may have to prepare a Supplemental EIS ("SEIS"). NEPA requires agencies to prepare a SEIS when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(ii). When determining whether to prepare a SEIS, an agency must "apply a rule of reason," continuing to maintain a "hard look" at the impact of agency action when the "new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 373-74, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotation marks and alteration omitted).

1. Courts Require Agencies to Supplement EISs to Ensure the Public and Decisionmakers Have Considered Relevant and Up-to-date Information on Significant Environmental Effects.

Courts require agencies to prepare a SEIS in a variety of settings where new information and/or project changes have been presented after an initial EIS has been prepared. *See, e.g., Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 561-62 (9th Cir.2006) (requiring preparation of SEIS after agency changed a policy on which the original EIS had relied, and noting that the bar for whether "significant effects" may occur is "a low standard."); *Oregon Nat. Res. Council v. Marsh*, 52 F.3d 1485, 1491 (9th Cir. 1995) (SEIS required in light of new information concerning sensitive species and impairment of fisheries); *see also Kunaknana v. U.S. Army Corps of Engineers*, 23 F. Supp.3d 1063 (D. Alaska 2014) (ACOE's failure to provide reasoned analysis for decision not to issue SEIS for fill permit in light of project changes was arbitrary and capricious).

A principal reason for the requirement to prepare a SEIS where new information or circumstances have arisen is that "[i]nformed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA." *League of Wilderness Defenders/Blue Mountains Diversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) (citing cases). In *League of Wilderness Defenders*, the court granted a preliminary injunction, finding that plaintiffs were likely to prevail on their claim that a SEIS must be completed once project changes had been introduced. There, the Forest Service had approved a logging project, but the original environmental review contemplated a Travel Management Plan that had subsequently been removed from the project. The court agreed

that the change warranted a supplement, explaining that the public “should not be required to parse the agency’s statements to determine how an area will be impacted, and particularly to determine which portions of the agency’s analysis rely on accurate and up-to-date information, and which portions are no longer relevant.” *Id.*

Notably, “even if post-EIS changes in a project are beneficial to the environment or are intended to mitigate environmental impact, if those changes are significant, a supplemental statement is [still] required” *National Wildlife Federation v. Marsh*, 721 F.2d 767, 782 (11th Cir. 1983) (citing *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981)). In *National Wildlife Federation*, the court held that adoption of a Mitigation Plan necessitated preparation of a SEIS because the Mitigation Plan would have significant qualitative environmental impacts that were not discussed in the original EIS. 721 F.2d at 784.

2. The ACOE Cannot Rely on the Outdated EIS, which Does Not Discuss the Impacts of the HMMP, in Issuing the Permit.

Here, the proposed 2017 HMMP introduces significant new circumstances and entire actions with environmental consequences that were not addressed in the EIS. As in *National Wildlife Federation*, even if the intended purpose for the HMMP is to be environmentally beneficial, the question is whether environmental changes associated with the HMMP are significant. In this case, they are both significant and adverse, since the restoration project would have a detrimental effect on the Preserve, including on species and habitat as discussed above, in addition to direct impacts in the area of implementation that may or may not be beneficial.

As in *League of Wilderness Defenders*, a SEIS is required here in order to facilitate informed public participation, essential to the proper functioning of NEPA. The existing EIS did not include any discussion of the impacts that will occur to the Preserve. Indeed, TNC was unaware of any such impacts until informed of the revised 2017 HMMP well after it had been proposed. Just as the EIS in *League of Wilderness Defenders* was outdated and required a supplement after a component of the project had been eliminated, here the EIS is outdated and inaccurate now that a component of the Project has been added. In both cases, the EIS fails to account for the actual environmental impacts of the proposed project, and here there is no discussion at all of impacts to the Preserve.

III. CONCLUSION

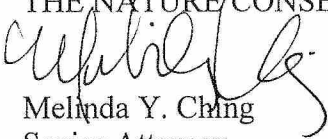
TNC met with Rosemont at their office in Tucson, on two separate occasions (May 21st 2018 and July 2nd 2018) to express our concerns and offer alternative design concepts, including discussion of a less sinuous channel and beneficial enhancement of the existing creek channel. At our second meeting Rosemont offered to forward any data or modeling they may have that would address our concerns regarding sediment transport. As of the date of this letter, TNC has not received any materials from Rosemont, leading us to believe that impacts on our Preserve have not been fully evaluated.

In light of the HMMP impacts identified above that were not evaluated in the EIS or Biological Opinion, including downstream impacts on the Preserve, the ACOE cannot issue the Permit in compliance with the ESA and NEPA prior to reinitiating consultation and supplementing the existing EIS.

TNC will be submitting a supplemental technical letter in the near future outlining in more detail the impacts that would be expected from implementing the HMMP as proposed.

Sincerely,

THE NATURE CONSERVANCY



Melinda Y. Ching
Senior Attorney

cc: Pat Graham, The Nature Conservancy in Arizona
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